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The Right of Privacy

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THE RIGHT OF PRIVACY

The right of privacy, after a period of apparent stagnation, is now undergoing a new era of development. This right which has been variously called "the right of an inviolate personality," "the right to be let alone," "the right to be free from unwarranted publicity," and "the liberty of silence," has been admitted by recent cases to an entirely new and distinct field of usefulness. Not only is the right becoming more secure in its recognition but also less limited in its application. In the instances referred to the new growth has taken place in jurisdictions which long have recognized the right of privacy as a common law right. In each case the predicted status of the doctrine of privacy seems now close at hand: "But if privacy is once recognized as a right entitled to legal protection, the interposition of the courts cannot depend on the particular nature of the injuries resulting."[1] For a long time after the right was first accorded judicial recognition it seemed that such a standing would not soon be realized. Even where the right was recognized its application was strictly limited. Seldom was it invoked except for a single stereotyped set of facts. This stereotyped case in which the doctrine was applied almost always involved the unauthorized use of a person's name or picture for advertising purposes.

In this particular it is believed that the right of privacy was largely the victim of circumstance. Of course the difficulty of finding a derivative basis for the right of privacy and the corresponding difficulty of working out a rationale for the doctrine had something to do with its limited application. The courts confused the nature of the right; there was uncertainty

[1] Brandeis and Warren, The Right to Privacy, 4 Harv. L. Rev. 193, 205.

as to whether the right was a property right or a personal right. Inasmuch as literary property rights were adopted as the derivative basis for the right of privacy by most of the early cases the typical advertisement case furnished an ideal set of facts which involved both personal and property interests: it was a case of "privacy affected with a commercial interest." Nevertheless it is believed that the main reason the right of privacy was not invoked in cases involving a greater variety of facts was largely a matter of circumstance. It so happened that the three leading early cases which thoroughly tested the right of privacy after it had been set forth by law publicists happened to involve this identical set of facts.[2] All three cases, arising in widely separated jurisdictions, were advertisement cases. In the only one of these three jurisdictions which refused to recognize the common law standing of the right a statute was subsequently passed which incorporated this very same set of facts in the cause of action which it created and termed the whole creation "the right of privacy."[3] This is believed to have had no little effect in giving rise to the false impression that this constituted exclusively the right of privacy.

Not unlike the growth of other newly asserted rights has been the growth of this right. We might well have expected the period of dormancy and stagnation which followed its first utterance and recognition: such a period is quite characteristic of natural growth. Yet this same period of dormancy is equally a promise of the growth and development which is at hand. To be sure this new development of the right of privacy furnishes a striking example of the adaptability of the common law to the demands of a changing society. In no less a manner it illustrates the power of the law school teacher and law publicist. Prior to 1890 the right of privacy as such was practically unheard of.[3a] At this time there appeared in the Harvard Law Review a very able article on the subject which was the joint work of Louis A. Brandeis and Samuel D. Warren.[4]

[2] *Roberson* v *Rochester Folding Box Co.*, (1902), 171 N. Y. 538, 64 N. E. 442, 89 A. S. R. 828, 59 L. R. A. 478; *Pavesich* v. *New England Life Insurance Co.*, (1909), 122 Ga. 190, 50 S. E. 68; *Milburn Co.* v. *Chinn* (1910), 137 Ky. 834, 127 S. W. 476.

[3] This statute is discussed *infra* as a separate subject.

[3a] But we do find scattered references to the right as, for instance, in the case of *De May* v. *Roberts* (1881), 46 Mich. 160.

[4] "The Right to Privacy," 4 Harvard Law Review 193.

This article was not only the chief cause of the recognition of the right by the courts but it was also comprehensive enough to have been largely instrumental in this latter day extension of the right.

After the close of the first period of recognition which followed the publication of this article a law publicist said: "A stage has now been reached where immunity should be afforded against the use of one's personality for private gain by others, or to feed a prurient curiosity."[5] We might have expected that with the advent of the tabloid and similar journalism the right of privacy would have been seized upon as a much needed protection. But curiosly enough this has not been the avenue of pre-eminent development. Along with the rise of this type of journalism there has come a corresponding and parallel indifference on the part of the public to its inroads on privacy. Many have been willing to agree with the press agent of a noted comedian when he facetiously said: "Any publicity, even though unfavorable, is better than none at all." So this new development has occurred where it was less expected. Yet here again the growth is not unnatural. As soon as the recognition of new rights or of new channels of redress has become sure, men have employed fictions to use the new-found protection to meet existing needs. New rights are developed up until the stage of recognition by analogy to existing rights. Once recognized, however, the new right may become independent in character or it may become interrelated to the prior existing rights. In the case of the right of privacy the development has taken the latter course. Especially is this evidenced in the more recent cases. The right has been used to bolster up other analogous rights in places where technical restrictions appeared to obstruct their greatest usefulness.

It is not the purpose of this article to re-examine the foundation work of the right of privacy. Any such handling would be of necessity largely a repetition of the work so ably accomplished in the early Harvard Law Review article already referred to. Nor is it within the scope of this article to discuss privacy cases which do not center around personality. It is true that "the great citadel of privacy is the home. It is there that

[5] 12 Columbia Law Review 693.

the most intimate of human affairs are housed"[5a]. But it is obvious that this phase of privacy is a complete subject in itself. Rather it is the dual purpose of this article to give a somewhat comprehensive review of the situation in the states which have refused to recognize the right, on the one hand, and to trace the development which has occurred since the publication of that article in the jurisdictions which have accorded the right a common law standing, on the other hand. In the former case especial stress will be laid upon the situation which has developed in New York and the consequent problem of handling the matter by statute; while in the latter case the latest turn in the development as represented by two recent cases will be considered. To this end the various matter will be discussed under the following heads:

1. The Right Rejected
2. New York Status and Statute of Privacy
3. The Right Recognized
4. The Right of Privacy in Other Countries
5. Limitations to the Right
6. Remedies
7. Recent Development of the Right.

THE RIGHT REJECTED

Three States, New York, Rhode Island, and Washington respectively, have flatly rejected the right of privacy, while a fourth State, Michigan, in a more doubtful case also has rejected the right and refused it a common law standing. In the first decided of these cases the entire doctrine is considered and rejected by a divided court. This New York case, its background, its history, its basis, and the result which it produced are discussed *infra* as a separate subject. Inasmuch as the other cases involve much the same reasoning they will not be considered in detail but the additional reasons given by the courts for rejection will be noticed. In the Rhode Island case[6] the defendants published, in connection with their advertisements, a picture of the plaintiff seated in an automobile in connection with certain words relating to the price and quality of the garments worn by those represented in the picture. The case is somewhat peculiar in

[5a] Ward, The Scope of the Constitutional Immunity against Searches and Seizures, 34 West Virginia Law Quarterly 137.

[6] *Henry* v. *Cherry* (1909), 30 R. I. 13, 73 A. 97, 24 L. R. A. (N. S.) 991.

that the declaration was in trespass *vi et armis* yet the case is cast squarely on a supposed right of privacy and it was so considered by the court. The court held that a person has no right of privacy for the invasion of which an action for damages lies at the common law. The court was quite willing to admit the desirability of some protection of privacy but said that the function of adjusting remedies was a legislative and not a judicial one. The court erred, however, in at least one point in its definition of the right which it refused to recognize. The court over-painted the picture when it said: "These definitions show that the right of privacy contended for would embrace all forms of interference with the mental well-being of an individual, whether by publishing his picture, by gossip, or by pointing him out as possessed of peculiar qualities." The propounders of the right had specifically set forth that, "The law would not grant any redress for the invasion of privacy by oral publication in the absence of special damage."[7] Nor had any case gone beyond this limit.

In the Washington case[8] the defendant newspaper published a photograph of the plaintiff as a part of an article which stated that her father was charged with a certain crime. There was a code provision in Washington which provided that it should be libel "to expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse." And yet the court held that the publication of the photograph was not actionable either as statutory libel or as a violation of the right of privacy. In criticising this decision a note writer has well said: "To print a picture of a prominent millionaire's daughter as a part of a story that her father was indicted and would be arrested for a penitentiary offense, would not, holds the Washington court, 'tend to deprive her of social intercourse among right-thinking people, but would rather tend to excite pity for her.' It is submitted that the psychological ratiocination of the court will not bear close scrutiny."[9] It would seem that under a more liberal interpretation this statute might have protected the substantial rights of privacy itself, even if the court were unwill-

[7] 4 Harvard Law Review 193, 217.

[8] *Hillman* v. *Star Publishing Co.*, (1911), 64 Wash. 691, 117 Pac. 594, 35 L. R. A. (N. S.) 595.

[9] 10 Michigan Law Review 335.

ing to accord the right of privacy as such a common law standing. Nevertheless the court was not only unwilling to allow what appears a less liberal interpretation of the statute but also specifically rejected any right of privacy.

A fourth state, Michigan, is supposed to have denied the right of privacy.[10] The court refused to restrain the use of the name and likeness of a deceased person as a label for a brand of cigars named after him. While the court said it would not allow a remedy in such a case, however desirable it might be, "so long as such use does not amount to a libel," the authority of the case has been denied[11] on the ground that the case could have been disposed of otherwise, as the person whose right had been infringed was dead and as the right being personal died with him.[12] The total rejection of the right of privacy by this case has been said to be *obiter* yet the case is generally cited as denying such a right. It seems that it should be taken as authoritative since the basis suggested as a substitute would be in affirmation of the right, a position which the court expressly refused to take. In connection with this case it is interesting to note that the court nowhere referred to the Michigan case of 1881[12a] in which the court, in allowing damages in an action on the case against a doctor for bringing a person other than a physician with him to attend childbirth said: "The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this by requiring others to observe it, and to abstain from its violation."

The only other case denying the right of privacy is a case arising in Illinois and decided by the Federal Circuit Court of Appeals.[13] It is, however, a very weak case for the rejection of the right. The case involved the publication by a newspaper of an advertisement containing a portrait of a woman, together with a statement calculated to convey the idea that she was a nurse, and had personally used and as a nurse recommended the use of, a certain brand of whisky as a tonic. One of the two counts

[10] *Atkinson* v. *Doherty* (1899), 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219.

[11] 3 Michigan Law Review 559, 561.

[12] See note 67 *infra* and text at that point for a detailed consideration of this element.

[12a] Cited supra note 3a.

[13] *Peck* v. *Tribune Co.*, (1907), 154 Fed. 330. But see *Von Thodorovich* v. *Franz Joseph Beneficial Ass'n* (1907), 154 Fed. 911.

was in libel while the second was for an alleged violation of the right of privacy. While the court did not expressly deny such right, the decision seems a negation of the right in regard to one of its essential elements. The court reasoned that in some states the *maxim de minimis non curat lex* applies when there is no malice shown and that hence nominal damages could not be allowed in such a case. It was said that the defendant newspaper could have had no malice since it stood in the relation of printer and distributor only, acting without knowledge that the face printed and distributed was that of the plaintiff, and was not that of the person whose face it purported to be. Now it has been clearly set forth in respect to the right of privacy, that, "The absence of 'malice' in the publisher does not afford a defense."[14] The decision in the instant case would appear to be an abrogation of this rule, and to that extent a negation of the complete right of privacy.

NEW YORK STATUS AND STATUTE OF PRIVACY

The status of the right of privacy in New York is dealt with here at some length because it is believed to be representative of the result which may be expected from attempts to handle the matter by statute. The earlier New York cases show a decided inclination to recognize the right of privacy as a common law right. Up until the decision in the case of *Roberson* v. *Rochester Folding Box Co.*[15] in 1902, the tendency in New York was unmistakably toward such recognition. Had this tendency been carried to fruition it would have meant an orderly growth and development of the doctrine within the common law rather than without. There would have been no need for the statute which was passed in 1903.

In 1891, one year after the publication of the article in the Harvard Law Review entitled, "The Right to Privacy," and eleven years before the Roberson decision, the case of *Mackenzie* v. *Soden*[16] impliedly recognized the right of privacy. In that case the court restrained the unauthorized use of the *facsimile* of a physician's signature to a recommendation for a medicine. The recommendation was printed on advertisements, circulars

[14] 4 Harvard Law Review 193, 218.
[15] 171 N. Y. 538, 64 N. E. 442, 89 A. S. R. 828, 59 L. R. A. 478.
[16] 18 N. Y. S. 240.

and wrappers. The court termed this "an infringement of his right to the sole use of his own name." It is not clear from the decision whether the court looked upon the right as a personal right or a property right. This implied recognition of the right ripened into express recognition one year later in the case of *Schuyler* v. *Curtis*.[17] However this case was subsequently reversed in 1895 on the ground that the person whose privacy had been invaded was dead.[18] This would seem to indicate that the court conceived of the right as being in the nature of a personal right rather than a property right. But it may be that the court "did not place its ruling upon any ancient branch of the law but simply stated that the act to be enjoined is an unauthorized act which has caused and will in the future cause, damage."[19] In connection with some of the later cases it is interesting to note that the act complained of in this case was the placing in a public place of a statue of the person to portray a "typical philanthropist."

The same year a peculiar yet interesting case arose which further illustrates the early inclination of the New York court.[20] Few cases even today carry the doctrine to such lengths. An action was brought to recover damages allegedly occasioned by the maintenance of an elevated railway in front of the house owned by the plaintiff. The court upheld the argument of the plaintiff that the rental value of some of her rooms had been affected by the fact that passengers and employees on the elevated railway station platform of the defendant company had interfered with the privacy of the occupants by looking in. The defendant company was held liable in damages for the consequent loss of rent.

The Superior Court of New York City affirmed the existence of the right of privacy again in 1893.[21] Here an injunction was granted against the unauthorized publication of the plaintiff's photograph in a popularity voting contest. The court said: "An individual is entitled to protection in person as well

[17] (1892) 24 N. Y. Supp. 512.

[18] 147 N. Y. 434, 42 N. E. 22. See on this case 36 American Law Register 745.

[19] See note in 21 L. R. A. 283, 284. Compare *Monson* v. *Tussaud*, 10 Times L. Rep. 199, 277.

[20] *Moore* v. *N. Y. Elevated R. Co.*, (1892), 130 N. Y. 523, 29 N. E. 997, 14 L. R. A. 731.

[21] *Marks* v. *Jaffa*, 26 N. Y. S. 908.

as property, and now the right to life has come to mean the privilege to enjoy life without the publicity or annoyance of a lottery contest waged without authority, on the result of which is made to depend, in public estimation at least, the worth of private character or value of ability." The application of the right of privacy, which was assumed to exist by the court, was sidetracked on a technical objection in a case which arose the following year.[22] Inasmuch as the court held that a parent should not be granted an injunction for the interference of his infant child's privacy it appears probable that the court considered the right personal in nature. Of course these tests are not conclusive by any means as to what the court considered the derivative basis of the right of privacy. It may be that the court was only following the analogy to the law of libel so far as remedies are concerned.

Not until the leading case of *Roberson* v. *Rochester Folding Box Co.*[23] is the doctrine again considered by the New York courts. It is not to be assumed, however, that the doctrine was entirely overlooked in the intervening years. On the contrary it is believed that the stage was being set for the climax. The history of the Roberson case leads to such a supposition. The case first found its way into the courts in 1890 and was before the courts until the final adjudication in 1902. At a special term of the Supreme court of Monroe County in 1890 a demurrer to the complaint on the ground that it stated no sufficient cause of action was overruled.[24] This decision was later unanimously affirmed by the Supreme Court, Appellate Division.[25] The Court of Appeals in June, 1902, reversed this decision by a four to three vote.[26] Whatever may have been the intent of Judge Parker who delivered the majority opinion, this opinion has been taken to be a complete denial of the right of privacy. In any event it is certain that Judge Parker expressly refused to recognize the doctrine as outlined by Brandeis in the Harvard Law Review. His reasons for refusal were:

1. Lack of precedent;

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[22] *Murray* v. *Gast Lithographic Co.*, (1894), 28 N. Y. S. 271.
[23] 171 N. Y. 538, 64 N. E. 442, 89 A. S. R. 828, 59 L. R. A. 478.
[24] 65 N. Y. S. 1109.
[25] 71 N. Y. S. 876.
[26] 171 N. Y. 539.

2. Fear that recognition might "open the floodgates of litigation;"

3. Fear that recognition might result in a restriction of the liberty of speech and freedom of the press.

The weakness of such reasoning was pointed out at the time by Judge Gray who delivered the dissenting opinion and has been subsequently criticized by leading law publicists.[27] Of course failure to find exact precedent is a plausible objection if true; but even then it was not an insurmountable objection. Analogous English cases had repeatedly set forth the basic rights which underlie the right of privacy. The earlier cases in New York were quite satisfied with the precedent which these cases furnished. The common law of Judge Parker's would seem an inelastic thing robbed of all its progressive features. That the "floodgates of litigation" might be opened is not a legal reason so long as the litigation remains legitimate. This objection might equally be raised to bar every development in our law. Nor is the third objection any more tenable. The right of privacy is of course limited by the mandates of free speech and a free press. But this limitation is upon the extent rather than the character of the right. In a like manner is the law of libel and slander limited; yet neither of these rights is entirely cut off by the paramount right of free speech.

The decision was both unexpected and unpopular. As a result of the case and the criticism which it evoked a statute on the subject was passed in New York within a year after the case had been decided.[28] The first section of the statute makes it a misdemeanor for a person, firm or corporation for advertising or for purposes of trade without the written consent first obtained to use a person's name, portrait or picture.[28a] The second section of the act provides for civil liability and affords both the remedies of injunction and damages. Even exemplary damages are allowable.[29] In the first case to test the statute the court declared the provision for civil liability valid but declared *obiter* that the provision of the first section of the act

[27] 3 Michigan Law Review 559; 4 Columbia Law Review 438.

[28] Chapter 132 of the Laws of New York of 1903, page 308.

[28a] Compare the Minnesota Statute against defamatory newspapers as outlined in *State* v. *Guilford*, (1928) 219 N. W. (Minn.) 770. Minor additions were made to the statute by the amendments of 1921. Laws 1921, c. 501.

[29] *Wyatt* v. *McCreary Co.*, (1908), 111 N. Y. S. 86, 87.

for criminal liability was invalid.[30] However a subsequent case before the New York Court of Appeals has sustained the validity of both provisions of the act.[31] The statute was here held to infringe neither state nor federal constitutions.

While the statute terms the right which it creates the "right of privacy" it may be well to inquire just how limited an aspect of the right the statute actually covers. The similarity between the hypothetical case which the statute develops and the actual facts of the Roberson case is apparent. "The statute merely recognizes and enforces the right of a person to control the use of his name or portrait by others so far as advertising or trade purposes are concerned."[32] For the most part the cases have held to the rather narrow construction which this first case placed upon the statute. It is difficult to see how any other interpretation could be placed upon the statute when we consider its wording. Then too the statute is in derogation of the common law according to the view of the New York court and must needs be strictly construed. And so it has been held that the right which the statute creates may be waived by contract.[33] Nor does the protection of the statute extend to a copartnership.[34] A person's picture has been held not to have been used for "advertising purposes" unless actually a part of an advertisement; and not for "purposes of trade" if used for dissemination of information as distinguished from commerce or traffic.[35] Nevertheless the same year the statute was held to protect an author against republication under his true name, without his consent, of books which he had published under a *nom de plume* without copyrighting. Such use of his name was held to be for purposes of trade.[36] It is interesting to note that the court considers the right which the statute creates personal in nature because in this latter case the author expressly disclaimed any literary property in the stories.[37]

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[30] *Wyatt* v. *McCreary Co.*, *supra* note 29.

[31] *Rhodes* v. *Sperry & Hutchinson Co.*, (1908), 193 N. Y. 223, 85 N. E. 1097, 127 A. S. R. 945, 34 L. R. A. (N. S.) 1143.

[32] *Rhodes* v. *Sperry & Hutchinson Co.*, *supra* note 31.

[33] *Fairbanks* v. *Winik* (1923), 198 N. Y. S. 299.

[34] *Rosenwasser* v. *Ogoglia* (1916), 158 N. Y. S. 56.

[35] *Jeffries* v. *N. Y. Ev. Journal Pub. Co.*, (1910), 124 N. Y. S. 780.

[36] *Ellis* v. *Hurst* (1910), 121 N. Y. S. 438. But compare the Mark Twain Case (1883), 14 Fed. 728.

[37] See *Pekas Co.* v. *Leslie* (1919), 52 N. Y. L. J. 1864, in which the right was explicity declared personal in nature.

But it must be remembered that it is not "within the evil sought to be remedied by that act to construe it so as to prohibit the use of the name, portrait, or picture of a living person in truthfully recounting or portraying an actual current event, as is commonly done in a single issue of a regular newspaper."[38] Yet in the same case which set forth this fundamental distinction the facts are held not to bring the case within the class of legitimate news because the plaintiff's picture and name were used as the nucleus of a story which was admittedly a fiction. The distinction is consistently drawn between cases in which the use of a person's picture is merely incidental to its publication as news and cases in which there is an exploitation of such person for monetary gain.[38a] And so a film manufacturing company was enjoined from displaying the name and picture of a woman who was portrayed as a woman lawyer who had solved a murder mystery. This was held to be exploitation rather than news by the lower court.[39] Upon appeal, however, the injunction was dissolved on the ground that the publication by moving pictures was legitimate news even though done for a profit.[40] The primary distinction between news and exploitation which the lower court had set forth was accepted by the Court of Appeals. The decision of the lower court was based largely upon the case of *Binns* v. *Vitagraph Co.*,[41] and the higher court thought the decision was a misapplication of the doctrine of the Binns case. In the Binns case the plaintiff's picture was used in a story which was admittedly a fiction to enhance its sale value; in this later case the picture was used as a part of the presentation of an actual current event.[42]

In an earlier case[42a] a publication in a newspaper of a story falsely purporting to be written by the plaintiff, followed by a short biographical sketch, and relating in the first person an

[38] *Binns* v. *Vitagraph Co.*, (1913), 210 N. Y. 51, 103 N. E. 1108; *Colyer* v. *Fox Pub. Co.*, 146 N. Y. 999; *Merle* v. *Sociological Research Film Corporation* (1915), 152 N. Y. S. 829.

[38a] The Statute has no application to and does not prevent the publication of a person's photograph without his consent in a daily newspaper in connection with ordinary news items. *Morse* v. *Press Pub. Co.* (1908), 109 N. Y. S. 963.

[39] *Humiston* v. *Universal Film Mfg. Co.*, (1917), 167 N. Y. S. 98.

[40] (1919), 178 N. Y. S. 752.

[41] *Supra* note 38.

[42] See 18 Michigan Law Review 437.

[42a] *D'Altomonte* v. *New York Herald Co.*, (1923), 139 N. Y. S. 200.

adventure in an African forest in which the plaintiff and his party rescued a young American from cannibals, and in which the plaintiff performed feats as impossible as they were absurd, had been held actionable under the statute. The court had said: "The story would have been just as good (or bad) a one as a literary production if the plaintiff's name had been omitted, and if no author's name had been appended. The obvious purpose of using the plaintiff's name was to give to the story an attribute of verisimilitude and authenticity. This, as I consider, was using the name for purposes of trade."

The New York Times of Saturday, November 10, 1928, carried an account of a New York Supreme Court decision rendered the day previous which deals with this very same problem as to just what use is "for purposes of trade." The news report of the case follows:

Edna Ferber, novelist, and Doubleday, Doran & Co., Inc., publishers of her book, "Show Boat," won yesterday their application to dismiss the complaint in a suit for $25,000 damages brought by Wayne Damron of Catlettsburg, Ky., on the ground that his name was used in the book, without his permission, for "purposes of trade," which is prohibited by the Civil Rights law. The name "Little Wayne Damron" was used in one chapter of the book and was alleged by the plaintiff to have referred to him, and in an uncomplimentary manner, because it related to ownership of "the Black Diamond Saloon" by "Big Wayne" and "Little Wayne Damron."

Justice Gavegan said in his opinion that the Civil Rights law "was not passed with the idea of interfering with the circulation of newspapers or the publication of books within proper limits, and the use of 'local color' was not outlawed." The Court said further:

> "It goes without saying that literary expediency may not be advanced as an excuse for violating the statute. It is well established that every incidental mention of some person's name in connection with advertising or trade does not constitute a violation of the provisions under consideration. The single appearance of plaintiff's name in this book is clearly not a use prohibited by the statute. It would impose uncalled for burden and hazard were we to hold that publishers and booksellers could not lawfully publish or deal in books without the production of genuine, written consent, from every one mentioned even once, or that an author could not lawfully mention any one without like consent."

Justice Gavegan said the sole question presented was whether "the reference to the plaintiff at a single place in the book is a use for the purposes of trade," and said that if the plaintiff's view of the Civil Rights law should be upheld "it is apparent that consequences never intended would follow from its enactment." Referring to the history of the statute, Justice Gavegan said the Legislature enacted it a year after the Court of Appeals in 1902 had refused to restrain a box company from using the name and photograph of a young woman in advertising flour.

This news report omitted the fact that an injunction was also asked to restrain the sale of the novel, which fact the Associated Press report carried by other papers, mentions. This news item is inserted here for the purpose of showing that the distinction which has been often followed between exploitation and news may not prove entirely satisfactory in every case and certainly will not be carried to an extremity. The term "local color" is merely a convenient way of avoiding this distinction.

The most liberal view of the statute yet expressed by the courts has certainly not been fulfilled in these cases we have considered. This liberal interpretation is found in the case of *Almind* v. *Sea Beach R. Company*: "The right of privacy under the statute cannot be invaded for purposes purely informative or redemptive, whether the altruist be entirely a charitable envoy or a railway company. No cause is so exalted that it may allure by exposing the portrait of a person to public gaze."[43]

But even with the most liberal interpretation does such a statute satisfactorily protect the right of privacy? Of course it is better than no protection at all, which was the situation in New York immediately after the Roberson decision. Yet the present status of the doctrine in New York appears very unsatisfactory. Nor is the fault as much with the legislature as with the court. The legislature was merely answering the popular demand for a remedy in just such a case as the facts of the Roberson case presented. Other equally important phases of the right of privacy are entirely unprovided for. The statute's rigidity and the consequent avenues of escape for the violator of privacy leave the statute so it affords almost no protection against the tabloid and similar scurrilous journalism. It seems quite unfortunate that the New York court should have taken such a position. The interpretation of the statute in the subsequent cases together with the present status of the doctrine in states which have recognized the right of privacy as a common law right have amply justified the fears of law publicists at the time the statute was passed: "It may well be doubted whether legislative declaration and definition of this right will prove as satisfactory, especially under rapidly changing conditions, as will the judicial recognition of the right."[44] Or, as Dean Pound

[43] (1913), 141 N. Y. S. 842.
[44] 8 Michigan Law Review 221, 222.

has said: "A man's feelings are as much a part of his personality as his limbs. The actions that protect the latter from injury may well be made to protect the former by the ordinary process of legal growth."[45] If we must have a statute on the subject, it would seem that it should at least be as broad as the French code provision which extends the protection not only to a man's name and picture but also to other phases of his purely private life."[45a]

THE RIGHT RECOGNIZED

The first two jurisdictions to recognize the right of privacy as a common law right entitled to protection were Georgia and Kentucky, respectively. Both of these state courts took this position in spite of the fact that a divided court in New York[46] and the Michigan court[47] had previously held just the opposite in the first two cases to thoroughly test the right. Some hint as to how the Georgia court would decide the question when it should be properly presented might have been gleaned from a case which arose some ten years previous to the present case. In holding a certain statute[48] unconstitutional the Georgia court said in 1894: ". . . general private right of silence enjoyed by all persons, natural or artificial, from time immemorial . . . Liberty of speech and of writing being secured by the state constitution, and incident thereto is the correlative liberty of silence, not less important."[49] This early reference, indirect though it may be, to the right of privacy has been overlooked in the discussions of the later Georgia cases.[49a]

In *Pavesich* v. *New England Life Ins. Co.*[50] the defendant published a picture of the plaintiff in connection with an insur-

[45] 28 Harvard Law Review 343, 364.

[45a] Loi Relative a la Presse, 11 Mai 1868.

[46] Discussed *supra* as a separate subject.

[47] *Supra* note (10) and text at that point.

[48] See *infra* note (108) for an explanation of the type of statute in question.

[49] *Wallace* v. *Georgia Ry. Co.*, (1894), 94 Ga. 732, 22 S. E. 579; In *Atchinson, T & S. F. R. Co.* v. *Brown* (1909), 80 Kansas 312, 102 Pac. 459, 23 L. R. A. (N. S.) 247, and in *St. Louis S. W. Ry. Co. of Texas* v. *Hixon* (1914), 106 Texas 477, 171 S. W. 703, L. R. A. 1917B, 1108, we find similar language.

[49a] Yet the Georgia court also had to override objections raised in earlier cases as for instance in *Chapman* v. *Tel. Co.*, 88 Ga. 763, 15 S. E. 9011 where it was said that the law does not undertake to redress psychological injuries.

[50] (1904), 122 Ga. 190, 50 S. E. 68.

ance advertisement. Under the picture were the words: "In my healthy and productive period of life, I bought insurance in the *X* Company; and today my family is protected and I am drawing an annual dividend on my paid up policies." By the side of the plaintiff's picture was the likeness of an ill-dressed and sickly looking person. Above the plaintiff's picture were the words: "Do it now. The man who did," while above the other picture were the words: "Do it while you can. The man who didn't." Nowhere was the plaintiff's actual name used. The court's decision cannot be taken as other than a complete recognition of privacy. In a very lengthy opinion the whole doctrine was considered and accepted. The right is catalogued among the absolute rights of personal security and personal liberty. The court reasons that if personal liberty embraces the right of publicity (freedom of speech and press), it likewise embraces its counterpart, the right of privacy; that a person has as much right to choose seclusion as to go in and out among his fellow men at will.[51]

It might be noted, however, that neither this case nor the cases which follow outline the derivative basis for the right nearly so satisfactorily as did Brandeis in the early article. In that article it was pointed out that rights which had previously been protected under supposedly different categories were in reality centered around the protection of an inviolate personality; that the unauthorized publication of letters, while termed an infringement of a literary property right, was in fact a violation of privacy; that the process of implying a trust in such cases, as some courts had done, was in fact nothing less than "a judicial declaration that public morality, private justice, and general convenience demand the recognition" of the basic right of privacy.[52] Such an elaboration by the courts on the bases for the newly-recognized right and the consequent development by analogy of the general concepts of personal liberty and personal security would have done much to still the cry of "judicial legislation." Nevertheless these early cases had a correct idea as to the nature of the right affected.[52a]

[51] Note the similarity to the quotation, *supra* note (49), from an earlier Georgia case.

[52] 4 Harvard Law Review 193, 205, 210.

[52a] See Pound, Interests of Personality, 28 Harvard Law Review 343, 364.

The Kentucky case[53] involved the same type of facts, and the court, in a less exhaustive but no less certain manner, upheld the right in its entirety. The case was bitterly fought from start to finish. Even after the final adjudication in the Kentucky courts the defendant refused to pay the judgment which the court had awarded, so a suit was brought thereon in the Federal Court at Buffalo, where the Kentucky judgment was upheld.[54] Upon appeal this decision was affirmed by the Circuit Court of Appeals.[55] Both the Georgia and Kentucky courts held there was no need of proving special damages.

These two cases are quite typical of most of the early cases on the subject. Since the date of the latter case similar cases have been similarly decided in the following states: New Jersey,[56] Missouri,[57] and Kansas.[58] In the case of Kansas we find a similar situation to that already noted in Georgia, namely the Kansas court nine years previous to the Kansas case mentioned above indicated a favorable handling of the right of privacy when it said in the case of *Atchinson, T. & S. F. R. Co.* v. *Brown*:[59] "It would seem that liberty to remain silent is correlative to the freedom to speak. If one must speak, he cannot be said to speak freely." In both the Georgia case and in the Kansas case the right of privacy was first recognized in this indirect and incomplete fashion as a constitutional right rather than as a right for the violation of which a tort action might lie. In both cases the recognition of the constitutional right antedated the fuller recognition by approximately the same period of time. Another state court has also referred to "the natural right to speak or be silent,"[60] but has not as yet been called upon to extend the recognition in a tort action for damages. In another part of this article we refer to a similar parallel in the states of Georgia and Kentucky between the first recognition of

[53] *Milburn Co.* v. *Chinn* (1907), 134 Ky. 424, 120 S. W. 364. Final adjudication by the Kentucky court: (1910), 137 Ky. 834, 127 S. W. 476. For the local background and a detailed history of the case see 4 Kentucky Law Journal 22.

[54] 195 Federal 158.

[55] 202 Federal 175.

[56] *Edison* v. *Edison Mfg. Co.*, (1907), 73 N. J. E. 136, 67 A. 392.

[57] *Munden* v. *Harris* (1910), 153 Mo. App. 652, 134 S. W. 1076.

[58] *Kunz* v. *Allen* (1918), 102 Kansas 883, 172 P. 532, L. R. A. 1918D, 1151. Commented on in 28 Yale Law Journal 269.

[59] (1909), 80 Kan. 312, 102 P. 459, 23 L. R. A. (N. S.) 247.

[60] *St. Louis S. W. Ry. Co. of Texas* v. *Hixon* (1914), 106 Texas 477, 171 S. W. 703, L. R. A. 1917B, 1108.

the right of privacy in the typical "picture-ad" case in each state and the recent extension of the application of the right in each state.[61] Of course these parallels are merely the creatures of chance but they are interesting nevertheless. We might also note that the Kansas case is a modern variation of the conventional "picture-ad" case, for in this case the exhibition of the plaintiff's picture in a motion picture theater was restrained.[62]

Apart from these cases there have been but few cases until the two most recent cases which have upheld the right of privacy. There was a single early New York case which went to some lengths in upholding the right.[63] Yet, inasmuch as the New York court later repudiated the entire doctrine of privacy in a case involving the typical advertisement elements only, this much more liberal application of the doctrine has been rendered all the more a nullity in that state. Then there are three more or less anomalous cases bearing on privacy. In one of these the Massachusetts court gave utterance to a statement on privacy which was pure *obiter* but which has been taken to have an important bearing on a different aspect of privacy.[64] The action was brought to restrain the publication of certain private letters of a deceased person, and the case was disposed of on grounds of literary property law. Yet the court said: " . . . the very nature of the correspondence may be such as to set the seal of secrecy upon its contents. See *Kendrick* v. *Danube Collieries & Mineral.*, 39 W. R. 43. Letters of extreme affection and other fiduciary communications may come within this class."

In a Kentucky case[65] a photographer was held liable in damages for using a photograph of a person's malformed child for purposes of his own when he had agreed with the person not to do so. While this case may be explained on the basis of the violation of a purely contractural obligation rather than the

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[61] See *infra* note (129) and text at that point.

[62] See also *Binns* v. *Vitagraph Co.*, (1913), 210 N. Y. 51, 103 N. E. 1108; *Merle* v. *Sociological Research Film Corporation* (1915), 152 N. Y. S. 829; *Humiston* v. *Universal Film Mfg. Co.*, (1917), 167 N. Y. S. 98, (1919), 178 N. Y. S. 752.

[63] *Moore* v. *N. Y. Elevated R. Co.*, (1892), 130 N. Y. S. 523, 29 N. E. 997, 14 L. R. A. 731. Discussed more in detail *supra* note 20.

[64] *Baker* v. *Libbie* (1912), 210 Mass. 559, 97 N. E. 109.

[65] *Douglas* v. *Stokes* (1912), 149 Ky. 506, 149 S. W. 849, 42 L. R. A. (N. S.) 386.

violation of any right of privacy,[66] a large portion of the opinion is given to this latter consideration. The court said: "The photographer had no authority to make the photograph except by their (the parents') authority, and when he exceeded his authority he invaded their right. We do not see that this case can be distinguished from those involving the like use of the photograph of a living person, and this has been held actionable. . . . The most tender affections of the human heart cluster about the body of one's dead child. A man may recover for an injury or indignity done the body, and it would be a reproach to the law if these physical injuries be recovered for and not those incorporeal injuries which would cause much greater suffering and humiliation. . . . If the defendant had wrongfully taken possession of the nude body of the plaintiff's dead child and exposed it to the public view in an effort to make money out of it it would not be doubted that an injury had been done them to recover for which an action might be maintained. When he wrongfully used the photograph of it, a like injury was done; the injury differing from that supposed in degree but not in kind."

Both of these last two cases involved also the question of what has been called "*post-mortem* privacy." The first case held, as had other previously decided cases,[67] that since the right of privacy was a personal right it died with the person. Yet the latter case takes the position that the person whose feelings are most vitally injured may be the surviving relative rather than the deceased. It could not have been otherwise in the Kentucky case. And yet there is no apparent reason why the same line of thought might not equally hold good in the case of personal letters of a deceased relative.[68] However the former case would appear more in line with libel and slander cases on the same point.

[66] But see statement of Logan, J., in *Brents* v. *Morgan* (1927), 221 Ky. 765, 299 S. W. 967, to the effect that the case could have been placed on no ground other than the right of privacy. However Chapin on Torts, page 241, note 7 takes a position contrary to Judge Logan.

[67] *Schuyler* v. *Curtis* (1892), 24 N. Y. S. 512, 147 N. Y. 434, 42 N. E. 22. Compare *Von Thodorovich* v. *Franz Joseph Beneficial Co.*, (1907), 154 Fed. 911.

[68] Compare also the case of *Murray* v. *Engraving Co.*, (1894), 26 N. Y. S. 908, in which it was held that a parent cannot maintain an action to enjoin the publication of the portrait of an infant child. See also note 10, *supra*, concerning a Michigan case, and 9 Harvard Law Review 354.

The third case was not placed on grounds of privacy either but involves in a less vital way a consideration of the right.[69] A false record as to an infant's parentage was cancelled in order to protect his vested property rights.

The only other cases involve photographs and descriptions of persons accused of crime. It has been held that where a person is not guilty of the crime he may enjoin the placing of his photograph in the rogues' gallery.[70] But another case has held that the person who so places such a picture in the rogues' gallery is not liable in damages.[71] It is clear that if the person has already been convicted of a crime he cannot object to his picture being placed in the gallery.[72] A Maryland case[73] has held that the photographing and measuring before trial for purposes of identification by the Bertillion system of one arrested on a criminal charge does not violate any of the rights of the accused person, if the photograph is not to be placed in the rogues' gallery, or the means of identification distributed prior to his conviction. Other cases also have made this distinction between photographing criminals for purposes of identification only and photographing them for purposes of publicity.[74] While not all of these cases have been placed squarely on the right of privacy, and while it has been doubted whether any of them should have been so placed,[75] it is undeniable that some of the more important of them were so placed by the courts.[75a] As said

[69] *Vanderbilt* v. *Mitchell* (1907), 72 N. J. E. 910, 67 A. 103. See Pound's statement in 29 Harvard Law Review 676 that case could have been put on privacy.

[70] *Itkovitz* v. *Whitaker* (1905), 115 La. 479, 39 So. 499, 1 L. R. A. (N. S.) 1147; *Schulman* v. *Whitaker* (1905), 115 La. 628, 39 So. 737, 7 L. R. A. (N. S.) 274. See also 13 Cornell Law Quarterly 470. See also *Schwartz* v. *Edrington* (1913), 133 La. 295, 62 So. 660, 47 L. R. A. (N. S.) 921, which is said by Long in 35 Yale Law Journal 125 to protect the right of privacy indirectly.

[71] *State ex rel., Bruns* v. *Clausmier* (1900), 154 Ind. 599, 57 N. E. 541.

[72] *Hodgeman* v. *Olsen* (1915), 86 Wash. 615, 150 P. 1122, L. R. A. 1916A, 739.

[73] *Downs* v. *Swann* (1909), 111 Md. 53, 73 A. 653, 23 L. R. A. (N. S.) 739.

[74] *Mabry* v. *Kettering* (1909), 89 Ark. 551, 117 S. W. 746, 122 S. W. 115; *Miller* v. *Gillespie* (1917), 196 Mich. 423, 163 N. W. 22, L. R. A. 1917E, 774.

[75] 21 Ruling Case Law 1200.

[75a] See also *Magourik* v. *Tel. Co.*, (1901), 29 Miss. 622, 31 So. 206, for a possible recognition of privacy or, at least, a basis therefor when the proper case shall be presented; and detective "shadowing cases", *Schultz* v. *Insurance Co.*, (1913), 151 Wis. 537, 139 W. W. 386.

in *Itkovitz* v. *Whitaker*: "Every one who does not violate the law can insist upon being let alone. In such a case the right of privacy is absolute."

THE RIGHT OF PRIVACY IN OTHER COUNTRIES

It may form an interesting detour to inquire as to the status of the right of privacy in lands other than our own. The following notes are not offered as an exhaustive survey of this problem but are rather intended to give a somewhat representative picture of the status of the doctrine in England, continental Europe, and a few of the more distant and less progressive countries of the world such as China and India.

As far as the earlier English cases are concerned it has already been pointed out that,[76] while they grant relief on supposedly different grounds such as breach of trust,[77] literary property rights,[78] or trade secrets,[79] they in fact center around the protection of an inviolate personality. Indeed in the most important one of these cases, the case of *Prince Albert* v. *Strange,* Cottenham, L. C., said: "In the present case, where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether." Nevertheless the injunction finally granted was placed on the ground that the defendant had been guilty of a breach of trust. In all of these early cases the courts in their "groping for some established principle" were willing to stretch the existing categories of rights rather than to place the case squarely on a supposedly new right, the right of privacy. In this respect the fact that an injunction was invariably asked and that thereby the question of equity's jurisdiction to protect rights other than property rights was raised, is believed to have been largely influential.[80]

Nor do the later cases in England evidence any material change from this early position. Cases which might easily have been placed on the ground of privacy, just as the earlier cases of *Prince Albert* v. *Strange* and *Pollard* v. *Photographic Com-*

[76] 4 Harvard Law Review 193, 208ff.

[77] *Abernethy* v. *Hutchinson* (1825), 3 L. J. Ch. 209; *Prince Albert* v. *Strange* (1849), 1 McN. & G. 25; *Tuck* v. *Priest* (1887), 19 Q. B. D. 639; *Pollard* v. *Photographic Co.*, (1888), 40 Ch. Div. 345.

[78] In all of the cases cited in the preceding note the courts found a property right in addition to the breach of trust.

[79] *Morison* v. *Moat* (1857), 9 Hare 241.

[80] See also note 118 *infra* and text at that point.

pany might have been placed,[81] have been placed again and again on the conventional grounds. Take for instance a case where the defendant without authority published the name of the plaintiff as one who shared in the responsibility for the defendant's enterprise; and where the plaintiff sought to enjoin such use of his name. The English court very promptly granted the relief by extending somewhat the earlier law as to trade marks and trade names.[82] Or take another case, decided in 1913, in which the publication of personal letters of the artist Whistler, was enjoined on grounds of literary property law.[83] Similarly the use of letters improperly obtained was restrained.[84] Sometimes we find cases placed on grounds of libel law which might have been placed on privacy.[85]

In those cases in which the plaintiff has been unable to place his case on some right other than the right of privacy he has failed.[85a] The case of *Corelli* v. *Wall*[86] furnishes an outstanding example. In this case Marie Corelli, a well-known authoress, sought an injunction to restrain the defendants from publishing and selling post-cards on which were colored representations depicting imaginary incidents in her life, such as the feeding of a pair of small ponies by Miss Corelli. The report of the case says an injunction was "asked either upon the ground that they were a libel upon her or that she was entitled to restrain the publication of a portrait of herself without her authority." The court was not satisfied that the cards were libellous so the injunction was refused. Similarly an injunction against the use of a physician's name with what purported to be a quotation from him in advertising a proprietary medicine was refused in

[81] See Wigmore, Select Cases on Tort, vol. 1, page 739ff, in which the author listed these two English cases under the title, "Mixed Harms: Loss of Privacy."

[82] *Walter* v. *Ashton* (1902), 2 Ch. 282.

[83] *Phillip* v. *Pennell*, 2 Ch. 577.

[84] *Asburton* v. *Pafe* (1913), 2 Ch. 469.

[85a] *Monson* v. *Tussauds ed.*, (1899), L. R. 1 Q. B. 671.

[85a] But we might note one more or less anomalous English case which protects an aspect of privacy. Where a property owner brought an action for the diminution of the value of his property resulting from the construction of a railroad in his vicinity, the necessary invasion of the privacy of a dwelling on his property was held a legitimate element of damages. *Buccleuch* v. *Met. Board of Works*, L. R. 5 H. L. 418. Compare this with the New York case cited in note 20.

[86] (1906), 22 L. T. Rep. 532.

the absence of elements of defamation or injury to his property, business or reputation.[87]

These English cases show the way the English courts have chosen to handle the problems presented by the right of privacy, namely, extend the existing principles of law rather than recognize a new principle or right. After all, the two methods, the English and the American, may finally reach the same end, for as we shall note toward the latter part of this article the right of privacy in America is again interrelating itself with the prior existing rights, and in so doing the right of privacy is extending these other fields of law in places where an extension is needed.

Of the countries of continental Europe, France has shown the most decided recognition of the right of privacy. By a provision of "the law of the press," passed in 1868, there is a prohibition against the publication of matter relating to the purely private phases of life.[88] There is a further provision of the French Penal Code, similar to provisions of the Ottoman, Siam and Chinese Penal Codes mentioned *infra*, which provides in substance that physicians, surgeons, druggists, midwives, or similar persons shall not disclose the secrets which have been committed to them by virtue of their profession.[89]

The Penal Codes of Turkey,[90] and the Kingdom of Siam,[91] and the new Criminal Code of China,[92] all have provisions similar to the provisions of the French Penal Code. The punishment inflicted on the violator by these statutes differs greatly; in France the punishment is from one to six months imprisonment and from one hundred to five hundred francs fine; in Turkey the imprisonment is from twenty-four hours to one week, and a fine from "one Mejidieh piece of twenty to one Mejidieh gold piece;" in Siam the punishment is "imprisonment not exceeding six months or fine not exceeding five hundred ticals, or both;" in China the penalty is "imprisonment for a

[87] *Dockerel* v. *Dougall* (1898), 78 L. T. Rep. 840, (1899), 80 L. T. Rep. 556.

[88] Loi Relative a la Presse, 11 Mai 1868. Quoted verbatim in 4 Harvard Law Review 193.

[89] French Code Penal, article 378.

[90] Ottoman Penal Code (Translation by Bucknill), article 215.

[91] The Penal Code for the Kingdom of Siam, section 280.

[92] Article 334.

period of not more than one year, or with detention, or with a fine of not more than five hundred yuan."[93]

The provision of the Siamese Code goes further than the others and provides that, "Whoever wrongfully discloses any private secret communicated to him by reason of his functions or profession," shall be punished as above stated. It may be interesting to note that the same result has been reached in England independently of any statute and that an injunction will be granted to restrain a person in a confidential position from disclosing information with which he has become acquainted by virtue of that relation.[94] Also in Switzerland independently of the type of statute quoted above, much the same protection has been afforded. However, the Swiss Civil Code does have a general provision to the effect that, "Where anyone is being injured in his person or reputation by another's unlawful act, he can apply to the judge for an injunction to restrain the continuation of that act."[95] Yet this statute hardly covers the case reported by Williams in his Sources of Swiss Law.[96] The quotation from Williams follows: "Breach of professional secrecy does, however, violate a personal right, namely the right to have one's privacy respected. So in the case of *Hilfiker* v. *Morel and Dr. Vouga.*[97] Plaintiff was under Dr. Vouga's care; the plaintiff's father-in-law, Morel, consulted the doctor, unknown to the plaintiff, about his patient's health; he had been demobilized, and his wife complained of his bits of inebriety. The doctor consented to give Morel a certificate to the effect that his son-in-law should be sent to an inebriates' home, and actually handed it over to Morel. The plaintiff, hearing of this, tried to get this certificate back, as damaging his character; failing he brought this action for violation of his right of privacy, asking for the return of the certificate. It was held, first, that the doctor had been guilty of breach of confidence, and that the remedy sought would be granted.

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[93] The translation of this new Chinese Code has been furnished us by Messrs. Yaó and Chang, who also inform us that within the last year a case has been decided in Shanghai which has attracted considerable attention. An actress was allowed to restrain the use of her name and picture without her consent, on a cigarette carton. The case is much like our "picture-ad" cases.

[94] *Gartside* v. *Outran* (1856), 3 Jur. N. S. 39.

[95] Section 28.

[96] Page 114.

[97] J. des T., 1919, D. F., 88.

The German Civil Code[98] has a provision which might plausibly be held to protect some of the phases of privacy although we have found no case in point. The Code provides: "When the right to the use of a name is disputed by another as against the rightful bearer, or when the interest of the rightful bearer is injured by another, who illegally uses the same name, the rightful bearer may demand of the other the discontinuance of this infringement. If further injuries are to be anticipated, he may sue to cause them to be discontinued."

In addition the Codes of the Kingdom of Siam[99] and of China[100] have provisions against the "disclosures of secrets" by breaking open letters, telegrams, and documents and disclosing the contents.

But by far the most extensive recognition of the right of privacy is found in India. Kenny in his case-book on Torts[100a] reports this very interesting case from India. In *Gokal Prasad* v. *Radho*[100b], Edge, C. J., said: "Owing to differences in the conditions of domestic life this custom, perfectly reasonable in India, is unknown in England. But in these provinces of India *Parda* (seclusion of ladies) has for centuries been strictly observed by all Hindus except those of the lowest castes, and by all Mohammadans except the poorest. The male relations of the *parda-nashin* woman—and the woman herself—would consider it a disgrace were her face to be exposed to the gaze of male strangers. . . . In the hot weather, great numbers of *parda-nashin* women are compelled by the climate to sleep in the open air, that is, in the courtyards or verandahs of their houses. A neighbor should not be allowed to open new doors or windows in such a way as would substantially interfere with those parts of his neighbor's premises which are used by *parda-nashin* women of the latter's family. . . . To deprive this neighbor's old building of the privacy which has been enjoyed, would deprive it of all residential value and in this way depreciate its market price. Such a right of privacy exists in these Provinces by custom; and any substantial interference with that right, affords the owner of the dominant tenement a good cause of

[98] Section 12.
[99] Chapter 2, section 279.
[100] Chapter 27, section 333.
[100a] Page 367.
[100b] I. L. R. 10 Allahabad 358.

action." Thus in India the law prevents observation as well as publication of the details of family life.

Kenny adds that, "In England no such right to freedom from observation exists nor can it even be acquired by prescription. So it was in vain that a dentist in 1904 sought for legal protection against 'the annoyance and indignity' to which a neighboring family at Balham were subjecting him by placing in their garden an arrangement of large mirrors which enabled them to observe all that passed in his study and his operating room."

LIMITATIONS TO THE RIGHT

Several limitations were predicted for the right of privacy:

(1) The right of privacy does not prohibit publication of matter of public or general interest.
(2) The right of privacy does not prohibit communication of matter under circumstances rendering it privileged according to the rules of libel and slander.
(3) There is no redress for invasion of privacy by oral publication.
(4) The right of privacy ceases on publication of facts by the individual or with his consent.
(5) Truth is no defense to an action for invasion of privacy.
(6) Lack of malice is no defense.

These limitations were advocated when the doctrine was first advanced[101] and have since received judicial recognition *in toto*.[102] This judicial recognition of exact limitations for the right by this late case does much to meet the objection which was made to the earlier cases that they did not define any limitations.[103]

Of these several limitations none has been so thoroughly discussed in the cases and so often misunderstood by the courts as this one: "The right to privacy does not prohibit any publication of matter which is of public or general interest." Of course this distinction has a sound foundation. But it is quite possible that some of the courts have carried the distinction too far. All such cases profess to acknowledge the general right of privacy yet the distinction which some of them draw between private and public characters is so sharp as to raise the question whether this distinction has not been seized upon as a conven-

[101] 4 Harvard Law Review 193, 214, 216, 217, 218.
[102] *Brents* v. *Morgan* (1927), 221 Ky. 765, 299 S. W. 967.
[103] 28 Yale Law Journal 270.

ient escape from applying the general rule. It is the "public interest" in the matter published rather than the fact that it is published about a so-called public character which invests the case with immunity from violating the right of privacy.

It is clear that the proposers of this limitation had in mind the parallel limitation in the law of libel of qualified privilege of comment and criticism on matters of public interest. A part of the confusion has come from the first case which stresses this feature of the right.[104] However, the opinion has been expressed[105] that the decision and the argument in this case were inflenced by a similar discussion in an earlier New York case.[106] In the Corliss case the court said: "I cannot consent to the proposition that Mr. Corliss was a private character. . . . A statesman, author, artist or inventor, who asks for and desires public recognition may be said to have surrendered this right to the public."

It is interesting to note the opinion of the Michigan court in a later case in which it denied the right of privacy, but commenting on this part of the Corliss case said: "We are loath to believe that the man who makes himself useful to mankind surrenders any right to privacy thereby, or that he permits his picture to be published by one person, and for one person, he is forever thereafter precluded from enjoying any of his rights. Just when a man becomes a benefactor to the public, so as to have this effect is not stated; but we see no reason for so treating Mr. Corliss, to the exclusion of myriads of people who, in a modest but effective way, perform public duties, or philanthropic acts or functions in which the public are interested."[107] Similar and much more caustic satires on the distinction taken in the Corliss case have been written by law publicists.[108]

This decision confronted the attorneys for the plaintiff in the famous Vassar College case[109] and they purposely cast

[104] *Corliss* v. *Walker* (1893), 57 Fed. 434, (1894), 64 Fed. 280, 31 L. R. A. 283.

[105] 12 Columbia Law Review 698.

[106] *Schuyler* v. *Curtis, supra* notes 17 and 18.

[107] *Atkinson* v. *Doherty* (1899), 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219. Discussed *supra* note 10.

[108] 39 American Law Review 37, or again in 89 A. S. R. 849, where it is said: "Such a rule obviously places a premium on mediocrity and incompetence."

[109] (1912), 197 Fed. 982. See also *Colyer* v. *Fox Pub. Co.*, (1914), 162 App. Div. 297, 146 N. Y. S. 999.

their action on grounds other than the right of privacy. Nevertheless the court went out of its way to re-affirm the distinction made in the Corliss case. In that case the defendant manufactured and sold a brand of candy called "Vassar Chocolates" which it advertised widely, employing the name "Vassar" together with a likeness of a young lady in scholastic garb and wearing a mortarboard hat, also using an imitation of the college pennant, a college yell, and imitation of the college seal, with the words "Vassar Chocolates" and "Always Fresh" substituted for the words "Vassar College" and "Purity and Wisdom." Refusing Vassar College an injunction restraining the use of its name and insignia, the court placed its decision on the dual ground that as a corporation, Vassar College had no such property right in its name as to maintain the injunction and, secondly, the privacy element referred to above. In connection with this latter part the court says: "The injury was psychological rather than real." To this extent the court evidences a bias against the right of privacy on the ground that it would afford a remedy for injured feelings. The propounders of the doctrine of privacy and the courts which first recognized it had to deal with this same problem, namely that a legal remedy for such an injury seemed to involve the treatment of mere wounded feeling as a substantive cause of action. This matter was gone into very thoroughly and it was pointed out that if the invasion of privacy constitutes a legal injury, the elements for demanding redress already exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation.[110]

Within the last year a case has been decided in the Alaskan court which involves again this element of public interest.[111] An injunction was sought to restrain a photographer from taking pictures of the movements of a North Pole expedition. The obvious fear of the plaintiff was that the defendant would take pictures and give them to the rival of a motion picture company

[110] 4 Harvard Law Review 193, 213. See also Goodrich, Emotional Disturbances as Legal Damage, 20 Michigan Law Review 497. The first court to recognize privacy had to face this objection also because an earlier case in that jurisdiction had said: "The civil law is a practical business system and does not undertake to redress psychological injuries," *Chapman* v. *Tel. Co.*, 88 Ga. 763, 15 S. E. 901.

[111] *Smith* v. *Surratt* (1928), 7 Alaska 416. Compare the case of *Sports and General Press Agency* v. *"Our Songs" Pub. Co.*, (1917), 2 K. B. 125.

to whom the plaintiff had granted exclusive picture rights and from whom he was receiving substantial financial aid. The court refused the injunction on the ground that the expedition was a matter of public interest.[112]

In the light of these decisions there seems to be a danger that the distinction between public and private characters may be a misconception of the original limitation in this regard as outlined by Brandeis. It has been suggested that "by occupying a public position or by making an appeal to the public, a person surrenders such part of his personality as pertains to or affects the position which he fills or seeks to occupy, but no further."[113] It is submitted that a still better criterion would be to make the test the public interest in the *matter* published rather then the public interest in the *person* about whom it is published, or even, the public interest in the *position* which such person occupies. The public character of a person's life or position, cannot deprive him of the right to be protected against libel. This phase is only helpful as an aid in determining whether the matter published is harmful or justifiable under the circumstances. It should not be otherwise with the right of privacy.

REMEDIES

More attention is given in this discussion to the limitations on the right and the remedies for the violation of the right than is usual, for, as Dean Pound has said, there is no doubt but that the right of privacy should be recognized, but "the problems are rather to devise suitable redress and to limit the right in view of other interests involved."[114]

There are two remedies which are available in case of the violation of the right of privacy, namely, tort action for damages, and injunction. There is no problem so far as the former is concerned, once the right itself is recognized. The cases which have refused damages, when damages alone were asked, have all been cases in which the refusal was placed on the sole ground that the right did not exist. This aspect is the more interesting when we consider the cases in which an injunction was asked.

[112] See comment on this case in one of the forthcoming issues of the Michigan Law Review (1928).
[113] 39 American Law Review 37, 49.
[114] 28 Harvard Law Review 343, 364.

It is worthy of note that in the first two cases recognizing the right of privacy, [115] in the two recent cases which have extended the application of the right,[116] and in a majority of the cases which have upheld the right, damages alone were asked. In contradistinction, an injunction was asked in the New York case which first repudiated the right.[117] To be sure, the case is placed on the ground that no such right existed, but we cannot help but wonder whether the court did not anticipate the secondary problem of remedies.

The difficulty, real or imaginary, in regard to remedies concerns the use of the injunction. It is not within the scope of this article to consider the problem in detail, nor would it be advisable, as there have been several exhaustive articles on this phase alone.[118] Briefly stated, the bugaboo which faces the courts is the theory that equity has jurisdiction to protect only property rights.[119] It has been said that it is in connection with the right of privacy that the doctrine that the jurisdiction of equity is confined to the protection of rights of property seems to have originated.[120] The conflict has been made doubly perspicuous from the fact that the right of privacy has been asserted to be a strictly personal right from its very cradle.

What have the courts done in such a predicament? Well, for the most part they have followed the lead of the classic case of *Gee* v. *Pritchard*[121] (the original case for the theory that equity has no jurisdiction of personal rights), and have transformed what was to all intents and purposes a personal right by a legal fiction into a property right. While upholding the right of privacy they have sought for and found a "nominal property interest."[122]

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[115] These cases are cited in notes 50 and 53 *supra.*

[116] These cases are cited in notes 130 and 133 *infra.*

[117] Cited *supra* note 23.

[118] Pound, Equitable Relief against Defamation and Injuries to Personality, 29 Harvard Law Review 640; Long, Equitable Jurisdiction to Protect Personal Rights, 33 Yale Law Journal 115, and 122ff, especially; Chafee, The Progress of Law, 34 Harvard Law Review 388, 407-415; and lengthy note in 14 A. L. R. 295.

[119] See 14 A. L. R. 296 for a list of cases so holding.

[120] 33 Yale Law Journal 122.

[121] (1818) 2 Swanst 402.

[122] *Munden* v. *Harris* (1910), 153 Mo. App. 652, 134 S. W. 1076; *Venderbilt* v. *Mitchell* (1907), 72 N. J. E. 910, 67 A. 103; *Edison* v. *Edison Mfg. Co.*, (1910), 73 N. J. E. 910, 67 A. 103. See the statement of Dill, J., in 72 N. J. Eq. 910, 919, 67 A. 97, in which he says: "In many

What should the courts do in such a case? They should cease what Dean Pound has called, their "unintelligent adherence to the *dicta* of a great judge in the pioneer case."[123] And it is interesting to note that this is precisely what the courts are doing. As has been said: "It appears that there is a growing tendency on the part of the courts to repudiate the theory that equity has jurisdiction to protect and enforce only property rights, and expressly to recognize the doctrine that personal rights stand on at least as high a plane as property rights, and often cannot be adequately protected except in a court of equity."[124] There is no reason why the mandates of preventive justice should not override an antiquated technicality as far as the rights of personality are concerned. And it so happens that the development of the right of privacy is the particular aspect of personality which has wrought the "first determined onslaught on the oft-repeated doctrine that equity protects only rights of property."[125]

It is believed that the New York statute by its influence will accentuate the tendency of the law in this direction. Whereas the influence of the New York statute has been bad in creating the idea that the right of privacy was exclusively limited to the typical "picture-ad" case,[126] the influence of the statute should be good in respect to remedies, for it explicitly gives both the remedies of damages and injunction, and almost all of the cases brought under the statute have included a prayer for an injunction.

RECENT DEVELOPMENT OF THE RIGHT

Now for a consideration of the late cases which are significant in marking a change from the rather stereotyped cases in which the right was invoked previously. The rough outlines of this growth have already been suggested at the beginning of this

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cases courts have striven to uphold the equitable jurisdiction upon ground of some property right, however slender and shadowy, and the tendency of the courts is to afford more adequate protection to personal rights and to that end to lay hold of slight circumstances tending to show a technical property right."

[123] 29 Harvard Law Review 640, 641.

[124] 14 A. L. R. 295.

[125] Chafee, The Progress of Law, and especially the section entitled, The Extension of Equitable Jurisdiction beyond the Protection of Property Rights, 34 Harvard Law Review 407-415.

[126] See note 3 and text at that point.

article. We have already suggested that as soon as the recognition of new rights or of new channels of redress has become sure, men attempt in every conceivable way and even by the use of fictions to utilize the new-found protection to meet existing needs. It is entirely to be expected that a stage should finally be reached where "the interposition of the courts cannot depend on the particular nature of the injuries resulting." Let us now elaborate on this point. A case which has come before the United States Supreme Court recently[127] furnishes a good example of the attempt to utilize the newly recognized right and also furnishes a splendid introduction to the most recent cases where the identical object has been achieved.

In an attack on the constitutionality of the so-called Service Letter Acts the defendant set up the right of privacy as a defense to an action brought against it by a former employee to whom it had refused a letter of recommendation. The Service Letter Act provided in substance that corporations should be required to issue letters to resigned or discharged employees stating the character and length of their service. The defendant corporation along with a variety of other defenses contended that the relations between a corporation and its employees were a matter of wholly private concern and that as such they were entitled to protection under the Fourteenth Amendment, for, said they, "liberty of silence" is as much guaranteed as its counterpart and correlative, freedom of speech. Of course the argument fell down in that the Fourteenth Amendment imposes no restrictions on the States in regard to freedom of speech even, as the Supreme Court pointed out.[128] Nevertheless the case shows to what extent men will go to use the right.

The two late cases which extend the right are furnished by Georgia and Kentucky. The cases were decided in 1924 and 1927 respectively. An interesting parallel is furnished by the fact that the first two jurisdictions to recognize the right of

[127] *Prudential Ins. Co.* v. *Cheek* (1922), 259 U. S. 530. See also 10 Harvard Law Review 179, for a suggestion as to possible newer phases of privacy.

[128] But see Statement of Sandford, J., in *Gitlow* v. *People of State of N. Y.*, (1925), 268 U. S. 652, 666. in which he says, "We may and do assume that freedom of speech and of the press which are protected by the First Amendments from abridgement by Congress are among the fundamental rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States."

privacy were Georgia and Kentucky, and that the dates of recognition were 1904 and 1907 respectively.[129]

In the Georgia case of *Byfield* v. *Candler*,[130] the defendant was a passenger on the same steamship with the plaintiff and her husband. These latter two had gone to their stateroom to retire for the night, but before retiring the husband left the room for a short while. During his absence the defendant entered the room and attempted to rape the plaintiff. However the screams of the plaintiff attracted her husband and he rushed back into the room and ejected the intruder after a terrific fight. The court instructed the jury: "I charge you that this action is for assault and battery upon the plaintiff and not for entering the plaintiff's room." This instruction was held error as the intrusion into the plaintiff's room constituted a violation of her right of privacy. The court said: "A passenger upon a vessel is entitled to the privacy of the room to which he or she is assigned, as against the improper, unjustified or unreasonable intrusions of others, and a violation thereof will give rise to an action. A violation of such right of the plaintiff, constituting a lesser wrong, would be embraced within an entire greater wrong, such as alleged in the petition, and the judge erred in giving the instruction complained of."

We have seen how the right of privacy was recognized by the Georgia court some years previously and that in that instance reliance was placed upon analogy to prior existing rights. Once recognized, however, what course should the development take? It may become either independent in character or interrelated to prior existing rights, or, again, the development may take both of these courses. The "picture-ad" cases evidence rather the former type of development, while this case and the next case considered evidence the latter type. The right has been used to bolster up other analogous rights in places where restrictions, either technical or otherwise, appeared to obstruct clear justice.

Now in the present case slight evidence of consent on the part of the plaintiff jeopardized her case if placed solely on the theory of assault and battery. Yet the demands of justice clearly seemed in her favor when we consider the case as a

[129] See notes 7 and 8 *supra* for these earlier cases.
[130] (1924), 160 Ga. 732, 125 S. E. 905.

whole.[131] So in this instance the right of privacy was used as a kind of last resort, or catch-all, for the plaintiff's case. In this respect the right of privacy temporarily usurped the place which would usually have been taken by the common law action on the case. As a note writer has said: "Yet it (the right of privacy) comprehends as actionable, something less than an assault. It is not quite a trespass to the person, and, since the plaintiff is a mere licensee on the steamship and not actually in possession of the premises, it is not a tresspass *quare clausum fregit*. But, after all, would not this conduct by the defendant have been actionable at common law in an action on the case, as an interference with the plaintiff in the exclusive enjoyment of the license to occupy, together with her husband, that portion of the steamship assigned to them?"[132]

The other and more recent extension of the doctrine was made by the Kentucky Court of Appeals in the case of *Brents* v. *Morgan*, decided November 15, 1927.[133] Some idea of the importance attached to the decision may be gained from the number of comments it has occasioned in the various law periodicals over the country.[134] In this case the defendant garage keeper exhibited in a conspicuous place in his show window a sign, five feet by eight feet in size, which read: "Notice. Dr. W. R. Morgan owes an account here of $49.67. And if promises would pay an account, this account would have been paid long ago. This account will be advertised as long as it remains unpaid." There is a statute in Kentucky which makes truth a complete defense in an action of libel,[135] so the plaintiff in this

[131] The petition makes the following allegations: "When petitioner's husband had left her, the stateroom door was closed, the light was turned out, and she was prepared to sleep. A short time after the petitioner's husband had left her, said defendant opened the door, tore the bedclothing off of her, disheveled her nightclothes, grabbed her in his arms and sought to get in bed with her for the purpose of debauching her."

[132] 10 Minnesota Law Review 55, 57. It is interesting to note that damages were allowed in an action on the case against a doctor for bringing a non-physician to attend childbirth in a Michigan case decided in 1881. See note 12a *supra*.

[133] 221 Ky. 765, 299 S. W. 967.

[134] 13 Cornell Law Quarterly 469-73; 41 Harvard Law Review 1070-1; 16 Kentucky Law Journal 364-6; 26 Michigan Law Review 682-4; 12 Minnesota Law Review 426; 1 Southern California Law Review 293-7; 6 Tennessee Law Review 291-4; 14 Virginia Law Review 652-6; 37 Yale Law Journal 835-6.

[135] Civil Code, section 124.

case admitted the truth of the statement and cast his case squarely on the right of privacy. The court held that a good cause of action for a violation of the right of privacy had been stated.

The court, speaking through Logan, J., said: "A new branch of the law has been developed in the last few years which has found place in the text-books and the opinions of the courts which is denominated the right of privacy. It has not been concretely defined, and probably is not subject to a concrete definition, but it is generally recognized as the right to be let alone, that is, the right of a person to be free from unwarranted publicity, or the right to live without unwarrranted interference by the public about matters with which the public is not necessarily concerned. . . . We are content to hold that there is a right of privacy, and that the unwarranted invasion of such right may be made the subject of an action in tort to recover damages for such unwarranted invasion."

Now in this case the restriction which obstructed the fullest usefulness of the law of libel which would have controlled, ordinarily, was the code provision that truth is a complete defense to libel. But this is not the only element which rendered the law of libel inadequate in the present case. Even if there had been, as there is in a few states,[136] a provision that truth is only a defense when the publication is for justifiable purposes, the law of libel would have been of no aid unless the plaintiff proved special damage.[137] As has been said: "This situation demonstrates the inadequacy of the law of libel to protect the individual against unwarranted publicity of his private affairs. The court avoided this difficulty by considering the injury as an invasion of the right of privacy, a right which it had previously recognized."[138]

The question has been raised whether the doctrine that truth is a defense in a civil action of libel will be rendered a nullity by the right of privacy.[139] In a like manner it was early

[136] *Florida Publishing Co.* v. *Lee* (1918), 76 Fla. 405, 80 So. 245; *Hutchins* v. *Page* (1909), 75 N. H. 215, 72 A. 289, 31 L. R. A. (N. S.) 132. In the former case the object was achieved by statute; in the latter by judicial decision.

[137] 41 Harvard Law Review 1071.

[138] Id.

[139] 1 Southern California Law Review 293.

sensed that the recognition of the right of privacy might be "the virtual extension of the law of libel."[140] However, this is not a valid objection to recognizing the right, as the need of such extension has been voiced in several statutes on libel. By some of these truth is made only a qualified defense.[141] By others the law of libel is so liberalized as to overlap in part the right of privacy, without labelling it as such. A statute passed in California in 1899 is an example of this latter type of statute: "It shall likewise be unlawful to publish in any newspaper, handbill, poster, book or serial publication or supplement thereto, any caricature of any person residing in this State, which will in any manner reflect upon the honor, integrity, manhood, virtue, reputation or business or political motives of the person so caricatured to public hatred, ridicule or contempt."[142] Of course this statute overdid the matter but it was at least expressive of the need of an extension of the law of libel. Yet another expression of this need is found in a different form in the Minnesota statute passed in 1925 which makes the business of publishing and circulating scandalous and defamatory newspapers a public nuisance which equity may enjoin.[143] Consider also such statutes as the "insulting words" statute in Virginia. It is submitted that this new use of the right of privacy will help to extend the law of libel in places where it needs extension, and that the law of privacy will parallel the law of libel as to matters about which the present rules are sound and adequate, as for instance, the matter of privilege or the relation to freedom of speech and press.

By way of summary we may note that New York, Rhode Island, Washington, and Michigan have rejected the right of privacy, and that in the first named state only, the situation resulting from rejection has occasioned a statute which has proved an inadequate and unsatisfactory method of handling the problem. We have pointed out that the several reasons given by the courts for rejection are clearly unsound. On the other hand the following jurisdictions have given the right un-

[140] 39 American Law Review 37-58.

[141] See note 136 *supra*.

[142] See Adams, The Right of Privacy and Its Relation to the Law of Libel, 39 American Law Review 37, 53.

[143] This statute is outlined in *State* v. *Guilford* (1928), 219 N. W. (Minn.) 770.

qualified recognition as a common law right entitled to protection: Georgia, Kentucky, New Jersey, Missouri, and Kansas. In addition we find varying degrees of recognition in Louisiana, Mississippi, Texas, and Massachusetts. The cases in all of these latter states would indicate a more complete recognition when the proper case shall be presented. The English courts have chosen to handle the matter by extending and even stretching the existing principles of law rather than by recognizing a new principle or right. But as we have pointed out, the two methods, the American and the English, may finally reach the same end, for in the former case the right of privacy which has been recognized is again interrelating itself with the prior existing rights, and in so doing extending other fields of law in places where an extension is needed. We have also given a partial picture of the status of the right of privacy in France, Germany, Switzerland, the Kingdom of Siam, Turkey, China, and India. Six limitations of the right have been suggested by law publicists and more lately recognized as a whole and separately by the courts. In regard to only one of these limitations has any difficulty arisen thus far, and a solution is suggested for that difficulty. The remedies for violation of the right are two, namely, tort action for damages and injunction; the later cases evidence a decided trend away from any technicalities which would restrict the usefulness of the latter remedy. Finally, we have noticed such an enlarged application of the doctrine in Georgia and Kentucky that we are led to wonder if a new period of quite general extension of application of the right of privacy has not been entered upon which may parallel the period of recognition of the right which came some quarter of a century earlier.

In conclusion we might ask, what of the future? How will the right of privacy be affected by the anticipated mechanisms of television? Or, again, a possible combination of the mechanisms of television and the fluoroscope? Will the right give way under such possibilities or will the day of its utmost usefulness just begin? Of course such questions are purely conjectural, yet they present problems, which, added to the ever-present dangers from scurrilous journalism, and the need of additional avenues of expansion for some of the technicality-

ridden fields of tort law, may make the right of privacy of unusual importance in the years just ahead.

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